IN THE

Supreme Court of the United States

NO. 75-736 OCTOBER TERM 1975

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

DUQUESNE LIGHT COMPANY, PENNSYLVANIA POWER COMPANY AND OHIO EDISON COMPANY,
Respondents

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENT TO BRIEF FOR RESPONDENTS, DUQUESNE LIGHT COMPANY, ET AL.

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On November 22, 1975, Respondents received a copy of a petition for certiorari in the above-captioned matter. On December 18, 1975 Respondents filed their brief in response to the petition in which they urged immediate consideration of the petition for certiorari, grant of the petition and accelerated argument.* The reason for the Respondents' action was to attempt to obtain review of the instant case by this Court at the same time as or prior to the review by this Court in the case of *Union Electric Co. v. EPA,* No. 74-1542, petition for certiorari granted October 6, 1975. Respondents' re-

*The brief in response was captioned "Brief For Respondents, Duquesne Light Company, et al., In Support Of Immediate Consideration Of Petition For Certiorari, Grant Of Certiorari, And Accelerated Argument."

quests to this Court were not granted, and argument of the *Union Electric* case took place on January 21, 1976. Accordingly, Respondents believe that it is now appropriate to set forth the reasons why the result below was correct so that this Court should deny certiorari regardless of its decision in the *Union Electric* case or, if it grants certiorari, why it should give the instant case individual and separate attention. The procedural history of the instant case is set forth in Respondents' brief in response to the petition for certiorari.

ARGUMENT

The Court of Appeals for the Third Circuit Correctly Held That the Inability of Major Sources to Comply With Emission Limitations in an Implementation Plan Is Relevant to the Administrator's Decision to Approve a Plan Because a Plan Which Cannot Be Implemented for Technological or Economic Reasons Will Not Result In Achievement of Ambient Air Quality Standards.

The view of the Environmental Protection Agency that the Administrator in making his decision whether to approve an implementation plan is forbidden to examine the ability of major sources to comply with the emission limitations in the plan is a classic example of inability to see the forest because of obsession with the individual trees of Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. §1857c-5(a)(2). The object of an implementation plan is (or certainly should be) achievement of ambient air quality standards. If a state advises the Administrator that it will achieve ambient air quality standards by placing restrictions on all coal fired electric generating stations of a major electric utility in the state, the Administrator has the duty to determine whether the restrictions are technologically and economically feasible before accepting them as the state's implementation plan. If he does not, and approves the plan, and the deadline for achievement of ambient air quality standards arrives with the emission sources unable to comply, the only alternatives will be termination of operation of the stations, or failure of the plan to implement the direction of the Clean Air Act to achieve prescribed ambient air quality. Since termination of the operations of an electric utility is far too drastic a measure to carry out, the result will be failure of the state implementation plan. Respondents

urge and the Third Circuit held that the Administrator has the duty under the Clean Air Act to conduct a sufficient review of an implementation plan to prevent this situation from happening.

The experience of Duquesne Light Company ("Duquesne") is a concrete example of the unsatisfactory result which follows if technical and economic considerations are ignored.

Duquesne commenced its investigation of flue gas desulfurization even prior to the adoption of the 1970 amendments to the Clean Air Act. Following the adoption of the 1970 amendments, Pennsylvania submitted to the Administrator an implementation plan which restricted emissions of sulfur dioxide from Duquesne's facilities to less than half the quantity EPA had advised could be attained with reasonably available control technology. The record in the present case shows that Pennsylvania made no study of means of attaining the emission limitation it selected. Pennsylvania's choice was a purely arbitrary one. However, that emission limitation was submitted to the Administrator with the representation that compliance with it would enable Pennsylvania to attain the primary ambient air quality standard for sulfur dioxide by July 1975. The Administrator in turn approved the plan without making any determination as to whether it was feasible to carry out its provisions.

Although Duquesne questioned its ability to meet the sulfur dioxide emission standard, it continued to work diligently on installing the technology necessary for flue gas desulfurization. To date it has invested more than sixty-six million dollars in flue gas desulfurization systems for its Elrama and Phillips generating stations.

As of the date of this brief, because of repeated failures of equipment and technical problems, these stations are still not in compliance with the emission limitation of the Pennsylvania Implementation Plan.

The Third Circuit recognized that the Administrator had a responsibility to do his best to make certain that ambient air quality standards were met in accordance with the statutory schedule. It concluded that if a state proposed an implementation plan that could only be successful if certain sources attained particular limitations, the Administrator had the duty to determine whether those emission limitations could be attained within the allowed time. If they could not, the Court held the Administrator had the duty to disapprove the plan. Under the Clean Air Act the state would then be required to devise a workable mix of emission limitations or other mechanisms for achieving the ambient air quality standards.

The Administrator cannot avoid his major responsibility under the Clean Air Act—achievement of ambient air quality standards—by arguing that he does not have the power under the Act to disapprove an implementation plan which he knows cannot produce that result because it cannot be carried out for technical or economic reasons.

CONCLUSION

For the above reasons the decision of the Court of Appeals for the Third Circuit was eminently correct and should be allowed to stand. The petition for certiorari should be denied under the present circumstances.

Respectfully submitted,

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